

2007

State of Utah v. C. Dean Larsen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

GEORGE LARSEN,

Defendant/Appellant.

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: **Appeal No. 20070187-CA**

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BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT ENTERED IN
THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON, JUDGE, PRESIDING.

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS

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BRIEF OF APPELLANT

JURISDICTION

UTAH CODE ANN. §77-18a-1(1)(a) (2003) and UTAH RULES OF APPELLATE PROCEDURE 3(a) provides this Court's jurisdiction over this appeal from the *Judgment* entered on February 2, 2007 (the "**Judgment**"), by the Seventh Judicial District Court in and for San Juan County, State of Utah, in this case involving Criminal Mischief, a Class B Misdemeanor; Criminal Trespass, a Class B Misdemeanor; and Disorderly Conduct, a Class C Misdemeanor.

**CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF
ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW**

ISSUE I: *Was the evidence presented sufficient to sustain the conviction of Criminal Mischief?*

STANDARD OF REVIEW: The standard of review for a sufficiency of the evidence

claim “is highly deferential to a jury verdict.” State v. Workman, 2005 UT 66, ¶ 29, 122 P.3d 639. “[This Court] begin[s] by reviewing ‘the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict.’” *Id.* (citations omitted). “[This Court] will reverse a jury verdict for insufficient evidence only if [it] determine[s] that ‘reasonable minds could not have reached the verdict.’” *Id.* (citations omitted). Stated another way, “[this Court] will reverse a jury verdict only when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, [it] find[s] that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.” State v. Lopez, 2001 UT App 123, ¶ 10, 24 P.3d 993.

ISSUE II: *Was the evidence presented sufficient to sustain the conviction of Criminal Trespass?*

STANDARD OF REVIEW: The standard of review for a sufficiency of the evidence claim “is highly deferential to a jury verdict.” State v. Workman, 2005 UT 66, ¶ 29, 122 P.3d 639. “[This Court] begin[s] by reviewing ‘the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict.’” *Id.* (citations omitted). “[This Court] will reverse a jury verdict for insufficient evidence only if [it] determine[s] that ‘reasonable minds could not have reached the verdict.’” *Id.* (citations omitted). Stated another way, “[this Court] will reverse a jury verdict only when, after viewing the evidence and all inferences drawn

therefrom in a light most favorable to the verdict, [it] find[s] that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.” State v. Lopez, 2001 UT App 123, ¶ 10, 24 P.3d 993.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

- A. UNITED STATES CONST. AMEND. V
- B. UTAH CONST. ART. I, § 7
- C. UTAH CODE ANN. §76-6-106
- D. UTAH CODE ANN. §76-6-206

STATEMENT OF THE CASE

On November 27, 2007, George Larsen (“**Larsen**”) was charged by *Information* in the Seventh Judicial District Court in and for Grand County with being a Restricted Person in Possession of Dangerous Weapon, a class A Misdemeanor; Criminal Mischief, a class B Misdemeanor; Criminal Trespass, a class B Misdemeanor; and Disorderly Conduct, a class C Misdemeanor. R001, R002.

A bench trial was held on January 23, 2007, at which time Larsen was found guilty of Criminal Mischief, Criminal Trespass, and Disorderly Conduct. R040- R041. Larsen was found not guilty of being a Restricted Person in Possession of a Dangerous Weapon. *Id.* On February 2, 2007, the trial court entered its *Judgment* sentencing Larsen to two (2) terms of six (6) months in the Grand County Jail to be served concurrently on the convictions of

Criminal Mischief and Criminal Trespass and ninety (90) days in the Grand County Jail to be served consecutively on the Disorderly Conduct conviction. R0043-R0044.

On February 22, 2007, Larsen filed his *Notice of Appeal*. R0055. On February 23, 2007, Larsen filed his *Amended Notice of Appeal*. R0062.

STATEMENT OF FACTS

A. State's Witness Tamela Hudyma's Testimony

Tamela Hudyma (“**Hudyma**”) testified that she lives at 610 Cane Creek Boulevard, #85, and was living there on November 15th, 2006. Tr. at p. 6. Hudyma testified that on said date, though she had been given a No-contact Order from Judge Manley prohibiting her from contacting George Larsen (“**Larsen**”), Larsen came to the door. *Id.* Hudyma testified that she understood she could not have contact with Larsen so she called the police. *Id.*

Hudyma testified that when Larsen came to the door, she was talking to her daughter on the phone. Tr. at p. 7. Hudyma testified that she told her daughter that Larsen was at the door, so she would have to hang up and call the police department. *Id.* Hudyma testified that she did not remember whether Larsen had banged, knocked, or yelled to alert her that he was at the door, but she knew it was Larsen when she saw him through the peephole. *Id.*

Hudyma testified that she called the police and then Larsen pushed in the door and threw down a card. Tr. at p. 8. Hudyma testified that the door had been previously damaged, and that it was further damaged by Larsen when he pushed it in. *Id.* Hudyma testified that she then heard somebody on the stairs, and Larsen came back up and she told him that she

had the No-Contact Order and that she had called the police department. *Id.* Hudyma testified that Larsen wanted to talk to her, that at one point he said that he was going to go downstairs and wait for the officers to show up, but that the officers showed up before he went back downstairs. Tr. at p. 9.

Hudyma testified that when the officers showed up, she and Larsen were in her bathroom. *Id.* Hudyma testified that ever since she suffered a head injury, whenever she doesn't know what to do, she goes into the bathroom for some reason. *Id.* Hudyma testified that she did not recall any yelling and screaming between her and Larsen when the officers arrived. *Id.* Upon being shown the State's Exhibit No. 1, a series of photographs, Hudyma testified that Larsen had broken the lock that night as well as the tape that she had previously applied to the door to prevent it from separating due to prior damage. Tr. at p. 10.

Hudyma testified that she got a protective order the next day. *Id.* Hudyma testified that though she was not afraid of Larsen, she was fearful of what Larsen might do next in his desperation of wanting to talk to her. *Id.* Hudyma testified that she thought it was best to get a protective order because she continued to get in trouble. *Id.* Hudyma testified that she had not necessarily stated in the protective order that she was afraid. Tr. at p. 11. Hudyma testified that she obtained the protective order because she thought it would eliminate any confusion as to who could talk to who and when. *Id.* Hudyma testified that the State's Exhibit No. 2 was her protective order, that she had made the statement therein, and that she had sworn to it. Tr. at pp. 12, 14. After reading the protective order silently to herself,

Hudyma testified that reading it had refreshed her memory, and that, as the protective order said, she had been fearful for herself and for Larsen because she did not want either of them to get into any further trouble for trying to talk to the other. Tr. at pp. 12-13. Hudyma testified that she was afraid of what might happen in the future if this was not resolved. Tr. at p. 13.

Hudyma testified that Paragraph (F) of the Protective Order was her sworn statement on the day she obtained said order. Tr. at p. 14. Hudyma testified that when Larsen came through her door she was afraid. Tr. at p. 15. Hudyma read the following statement from her protective order: “Breaking in my door makes me fearful for myself, and also for him, for I do not know what will happen next.” *Id.* Hudyma testified that she has had her door repaired since the night Larsen broke it, and that the repairs had cost two-hundred sixty dollars (\$260.00). Hudyma testified that the door that was broken belonged to her and not to Larsen. *Id.*

Hudyma testified that she is involved in a proceeding in juvenile court with the Division of Child and Family Services (“DCFS”), and that prior to the night in question with Larsen, her child had been removed from her custody. Tr. at p. 16. Hudyma testified that she had been required to do a urinalysis at the courthouse which came up initially as a positive, but that she found out a week and a half later that it was found by the lab to be a false positive. Tr. at pp. 16-17. Hudyma testified that the juvenile court judge, Judge Manley, was uncomfortable with Hudyma being in Larsen’s presence and with her daughter

being exposed to Larsen because the judge believed Larsen had a prior drug history. Tr. at p. 17. Hudyma testified that, to her knowledge, Judge Manley's discomfort with her being around Larsen or with her daughter being exposed to Larsen had nothing to do with any feeling that Larsen was a danger to Hudyma or a physical danger to her or her daughter. *Id.* Hudyma testified that the Order removing her daughter from her included the No-Contact Order restraining her from having any contact with Larsen. Tr. at p. 17-18. Hudyma testified that by stating that she was "afraid" meant she knew the situation was bad and did not want the situation with the No-contact Orders or with DCFS getting worse. Tr. at pp. 18-19. Hudyma testified that she was not afraid that her own physical safety would get worse. *Id.*

Hudyma testified that Larsen had never lived in her home, but that she had lived with him in his home. Tr. at p. 19. Hudyma testified that the last time that she and Larsen had lived together was in February of 2006. *Id.* Hudyma testified that Larsen still had some of his personal possessions in her home, including his fish tank and a pet Bearded Dragon that was originally supposed to belong to Hudyma's daughter, and for which they had all contributed funds. *Id.* Hudyma testified that Larsen had kept some of his movies as well as some of his clothes in her home at times when she was doing his laundry. Tr. at p. 20. Hudyma testified that Larsen had occasionally spent the night at her home in the past, but, more often, she would go to his house to spend the night. *Id.* Hudyma testified that at one time Larsen had a key to her home, but that on the night in question he did not have a key,

however, she testified that she had problems with the locks and nobody used a key. Tr. at p. 20-21.

Hudyma testified that her door had been cracked prior to the night in question. Tr. at p. 21. Hudyma testified that she thought, because of the door's splitting, that the door was hollow with a wooden core and a metal shell, and would swell in the summer causing it to stick. *Id.* Hudyma testified that the photos of the door in State's Exhibit No. 1 showed both the damage that had occurred prior to the night in question, as well as the damage done by Larsen. *Id.* Hudyma testified that the door had been taped because of the crack in the swelling. *Id.* Hudyma testified that she did not know if the police had removed the tape prior to taking the picture. Tr. at p. 21-22. Hudyma testified that there was still tape on the door when she came out of the bathroom after the police arrived. Tr. at p. 22. Hudyma testified that said tape was visible in the photographs in State's Exhibit No. 1, and that she did not know whether any tape had been removed. *Id.*

Hudyma testified that she did not see Larsen break the lock or kick in the door. Tr. at p. 22-23. Hudyma testified that she did not see any boot prints on the door. Tr. at p. 23. Hudyma testified that, other than the usual sounds of people going up and down the stairs, she did not see or hear another individual with Larsen, though she had been told that there was somebody else on the stairs. *Id.* Hudyma testified that somebody had come to the door, and she looked through the peephole and that Larsen was there. *Id.* Hudyma testified that she did not recall stating that Larsen had come up with anyone. Tr. at p. 24.

Hudyma testified that on the night of the incident, while what had occurred was still fresh in her mind, she had made out a written statement. Tr. at p. 24-25. Hudyma testified that she remembered hearing the wood crack on the front door as Larsen kicked in the door. Tr. at p. 25. Hudyma testified that the statement presented to her in court by the State was in fact the statement she had made and that, after reading it, her memory about what she had heard that night was refreshed. *Id.* Hudyma testified that, while she was in the bathroom and Larsen was at her door, she heard a crack that sounded like wood splitting. Tr. at p. 25-26.

Hudyma testified that she had not met in person with Detective Craig Shumway (“**Shumway**”) about the incident, but that she had talked with him on the phone. Tr. at p. 26. Hudyma testified that she had told Shumway that the door had been damaged before the incident, because of the sticking. *Id.* Hudyma testified that when Shumway had said that he might need her to come in and make out another statement, she had told him she already had, and he never got back to her. *Id.* Hudyma testified that she later received a subpoena. *Id.* Hudyma testified that she did not want any misunderstandings and that she told Shumway that she would not be pursuing the matter. *Id.*

Hudyma testified that her landlord had mentioned that she did not want Larsen on the property. Tr. at p. 27. Hudyma testified that the Utah Department of Workforce Services had helped her to get into her housing, and that she did not recall anyone from Workforce Services, including an employee named Belinda, ever objecting to Larsen’s presence on the property or specifying whether any specific person could be there. Tr. at p. 27-28.

B. State's Witness Craig Shumway's Testimony

Shumway testified that he had been employed by the Moab City Police Department for twelve (12) years. Tr. at p. 28-29. Shumway testified that he had wanted to talk to Hudyma and made a phone call to her home on the afternoon of the 11th of January, 2007, as well as going to her home and leaving a business card. Tr. at p. 29. Shumway testified that Hudyma called him back and he asked her about the door. *Id.*

Shumway testified that, in their phone conversation, he told Hudyma that he had some photographs he wanted her to see depicting the damage and asked her if the damage was there prior to the night in question. Tr. at pp. 30, 31. Shumway testified that Hudyma told him on the phone that the damage was not there prior to the incident, but that the door had been sticking. *Id.* Shumway testified that Hudyma told him there was nobody else with Larsen the night of the incident. Tr. at p. 30. Shumway testified that he asked Hudyma if she would make a written statement, and that she said she had made out a statement that night and was not going to make out another statement. *Id.* Shumway testified that Hudyma told him she did not want to pursue charges any longer. Tr. at pp. 30-31.

Shumway testified that he did not show Hudyma any of the pictures as his conversation with Hudyma about the damage to the door had transpired over the phone. Tr. at p. 31. Shumway reiterated his testimony that Hudyma had told him that the door was not previously damaged, but that it had been sticking. *Id.*

C. State's Witness Officer Aaron Woodard's Testimony

Officer Aaron Woodard ("**Woodard**") testified that he is employed by Moab City Police Department and has been in law enforcement for three (3) years. Tr. at p. 32. Woodard testified that he was working on the evening of the 15th of November, 2006, and responded to a call at approximately 7:00 pm to go to Hudyma's home. Tr. at p. 33. Woodard testified that he was advised by Dispatch that there was a disturbance at Hudyma's home, that Larsen was there, and that Hudyma had advised Dispatch that Larsen was not supposed to be there due to a protective order. *Id.* Woodard testified that he and Deputy Rogers ("**Rogers**") both showed up to Hudyma's residence at the same time. *Id.* Woodard testified that he and Rogers were the very first two to arrive on the scene. Tr. at p. 38. Woodard testified that when they came up the stairs they saw no one, but noticed that the door that was damaged was open, and they announced who they were and went in. Tr. at p. 33-34. Woodard testified that they could hear arguing and that he recognized Larsen's voice, which was agitated. Tr. at p. 34. Woodard testified that he then saw Larsen come around the corner from the bathroom with Hudyma. *Id.* Woodard testified that they started questioning Larsen in an effort to find out what was happening. Tr. at p. 35.

Woodard testified that Larsen said that he was there to drop off a letter. *Id.* Woodard testified that Larsen told them it was the fault of law enforcement that the child was taken out of the house and that he and Hudyma were having problems. *Id.* Woodard testified that

he and Rogers asked Larsen to calm down due to his agitation, and to place his hands on the wall. *Id.*

Woodard testified that he and Rogers feared because of Larsen's behavior that matters could worsen. *Id.* Woodard testified that Larsen kept bringing his hands down, so they placed him in handcuffs for their safety. *Id.* Woodard testified that, after Larsen was placed in handcuffs, he was still very agitated and continued blaming them for what had taken place. *Id.* Woodard testified that Hudyma was not considered agitated in a way that would compromise her safety or well being, as far as he knew. Tr. at p. 39.

Woodard testified that he and Rogers did a clear pat-down on Larsen and upon doing so they found a knife on Larsen's right hip in a leather scabbard. Tr. at p. 35. Woodard testified that they confiscated the knife marked as State's Exhibit No. 4, and were concerned about it because it was not the normal, pocket-size knife that would normally be in someone's pocket. Tr. at p. 36. Woodard testified that the knife was a full-size knife, not a folding knife, that he thought would be called a hunting knife, and that he did not believe the scabbard it was in had a snap, and that he did not take the scabbard from Larsen. Tr. at p. 39.

Woodard testified that he had Dispatch run a criminal history check on Larsen to see if he would be someone who is restricted from carrying a weapon, and it was found on the front page of the criminal history that Larsen had been convicted of felony. Tr. at p. 36-37. Woodard testified that, after he took the knife from Larsen because of his agitation, they

walked Larsen outside, placed him in the patrol car, and transported him to the sheriff's office. Tr. at p. 37. Woodard testified that at the sheriff's office, after Larsen was turned over to the booking staff, he was still very agitated, and that Woodard could see and hear him in his cell yelling, banging on the walls, making a loud disturbance, and asking why they kept doing this. Tr. at p. 37-38. Woodard testified that he did not take the photos attached to State's Exhibit No. 1, nor was he there when the photos were taken because he had transported Larsen to jail. Tr. at p. 39.

D. State's Witness Zane Lammert's Testimony

Zane Lambert ("**Lambert**") testified that he was employed by the Grand County Sheriff's Office, and that he had been in law enforcement for twelve (12) years. Tr. at p. 40-41. Lambert testified that he was working on November 15th, 2006, and responded to a call at Hudyma's apartment. Tr. at p. 41.

Lambert testified that this incident was the not the first to which he had responded at that residence. Tr. at p. 45. Lambert testified that, since he did not think the city would have a backup officer available for the incident and since the incident involved Larsen whose demeanor was known to Lambert, he responded to the call to Hudyma's residence. *Id.* Lambert testified that he believed he learned it was Larsen from Dispatch. *Id.* Lambert testified that he did not know where Larsen lived, but that he had seen him there and at his father's house. Tr. at pp. 45-46. Lambert testified that he is familiar with the location of her

apartment, and that he arrived just a few minutes after the call. Tr. at p. 41. Lambert testified that he was the last person who responded to the scene of the incident. Tr. at p. 44.

Lambert testified that upon arrival, he found Woodard and Rogers walking Larsen out of the building and down the stairs in handcuffs. Tr. at pp. 41-42. Lambert testified that he stood there while they walked by and then helped Woodard walk Larsen to the car, because Larsen was not calm, but appeared angry and very upset about their presence. Tr. at pp. 42-43. Lambert testified that Larsen was a little bit combative and was saying profanities towards them. Tr. at p. 43. Lambert testified that he imagined that Larsen's profanity towards him was in response to prior animosity rather than to something Lambert was doing that night, and that Lambert had been to the residence during the prior summer because of a problem with Larsen. Tr. at p. 46.

Lambert testified that he helped Larsen get seated in the car safely because he was concerned with officer safety for Woodard. Tr. at p. 43. Lambert testified that he talked to Woodard briefly and then Woodard took Larsen to jail. *Id.* Lambert testified that he went back upstairs, obtained a statement from Hudyma, and took the pictures of the broken door identified as State's Exhibit No. 1. *Id.* Lambert testified that the photographs fairly and accurately represent what the door looked like on that night. Tr. at p. 44.

Lambert testified that Hudyma told him that Larsen had broken the door. Tr. at p. 43. Lambert testified that Hudyma said that Larsen had knocked the door in once before, and had torn the door off. Tr. at pp. 43-44. Lambert testified that the door had been repaired with

tape. *Id.* Lambert testified that he did not know if the door had been altered by anyone or if anyone had opened or shut the door or tried to manipulate it or do anything with it before he arrived, or from the time that the officers arrived to the time that he had taken the photographs. Tr. at pp. 44-45. Lambert testified that he did not touch the door or remove any tape from the door. Tr. at p. 45. Lambert testified that when he arrived, the door was the way it appeared in the photographs. *Id.*

E. State's Witness Deputy Deston Rogers' Testimony

Deputy Deston Rogers (“**Rogers**”) testified that he is employed by the Grand County Sheriff's Office, and has been in law enforcement for four and one-half (4 ½) years. Tr. at pp. 46-47. Rogers testified that he was called to Hudyma's apartment at 610 Cane Creek, Apartment A-5, on November 15th, 2006. Tr. at pp. 47-48. Rogers testified that he thought he and Woodard were the first to arrive at the scene, and that he and Woodard arrived at about the same time. Tr. at p. 48, 50-51. Rogers testified that when he arrived he went up the stairwell to the apartment and could hear loud, argumentative voices inside the apartment. Tr. at p. 48.

Rogers testified that, before they entered the apartment, they noticed that the door had been damaged as if somebody had kicked and pushed it in. Tr. at p. 48, 51. Rogers testified that the door lock, a dead bolt, had been “busted out.” Tr. at p. 49, 51. Rogers testified that the damage to the door appeared to be fresh. Tr. at p. 48. Rogers testified that there was fresh wood laying on the carpet of the apartment. Tr. at p. 51.

Rogers testified he did not know how much damage there had been to the door prior to the incident. Tr. at p. 51. Rogers testified that there had been tape over the door and that he could see where the crack had actually cracked the tape. Tr. at p. 49, 51. Rogers testified that the photographs in State's Exhibit No. 1 were pictures of the damage to the door that he had seen that night, and that the photos accurately reflected what he saw as he went through the door that night. Tr. at p. 49.

Rogers testified that, after they heard yelling and had gone through the broken door, they identified themselves as law enforcement. *Id.* Rogers testified that Larsen and Hudyma came out of the bathroom area, and that Larsen seemed very irritated that law enforcement was there. *Id.* Rogers testified that, while Woodard remained with Larsen, he followed Hudyma back into the bathroom to talk to her and find out what was going on. *Id.*

Larsen testified that Hudyma said that she had been in the bathroom and heard the door pop. *Id.* Rogers testified that after he talked to Hudyma, they went back out and he talked to Larsen, who was irate. Tr. at p. 50.

Rogers testified that they became concerned for the safety of the officers and instructed Larsen a couple of times to put his hands up on the wall. *Id.* Rogers testified that Larsen refused to comply several times, so they decided to place him into handcuffs for safety reasons until they could keep the situation under control. *Id.* Rogers testified that at that point, they learned from Hudyma that there had been an argument. *Id.* Rogers testified that Larsen had mentioned something about trying to put a card in the house, and that there

actually was a card laying on the floor. *Id.* Rogers testified that, at that point, they decided they would arrest Larsen. *Id.* Rogers testified that Larsen refused to go with Rogers but would walk with Woodard to the patrol car, so Woodard took him down. *Id.*

F. George Larsen's Testimony

Larsen stated that Judge Manley had verbally restrained Hudyma from seeing Larsen, but that thirty (30) seconds after the court, Hudyma walked out and went with Larsen to see Sarah, her daughter. Tr. at p. 62. Larsen stated that he told Hudyma that she could not do that. *Id.* Larsen stated that Hudyma told him that the only way she could get her child back was to get a restraining order, that she had applied for one, and that she was not able to obtain one because there had been no threats. *Id.* Larsen stated that on the night of the incident, he had gone to Hudyma's residence to give her the card to tell her he was leaving so that she could get her life in order and get her daughter back. *Id.* Larsen stated that his only intention in going over there had been to leave the card. *Id.* Larsen stated that he did not threaten or hurt Hudyma in any way, and that he had not meant to cause problems. *Id.* Larsen stated that he had thought it was the right thing to do so Hudyma could get her daughter back. *Id.*

SUMMARY OF THE ARGUMENT

In order to challenge a court's factual findings, “an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court

below.”Chen v. Stewart 2004 UT 82, ¶76, 100 P.3d 1177, (Utah 2004), *citing* Wilson

Supply v. Fradan Mfg. Corp. 2002 UT 94 at ¶ 21, 54 P.3d 1177. UTAH CODE ANN. §76-6-

106 sets forth the elements of Criminal Mischief as follows:

- (2) A person commits criminal mischief if the person:
 - (a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;
 - (b) intentionally and unlawfully tampers with the property of another and as a result:
 - (i) recklessly endangers:
 - (A) human life; or
 - (B) human health or safety; or
 - (ii) recklessly causes or threatens a substantial interruption or impairment of any critical infrastructure;
 - (c) intentionally damages, defaces, or destroys the property of another; or
 - (d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.
- (3) (a) (i) A violation of Subsection (2)(a) is a third degree felony.
- (ii) A violation of Subsection (2)(b)(i)(A) is a class A misdemeanor.
- (iii) A violation of Subsection (2)(b)(i)(B) is a class B misdemeanor.
- (iv) A violation of Subsection (2)(b)(ii) is a second degree felony.

UTAH CODE ANN. §76-6-206 sets forth the elements of criminal trespass as follows:

- (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76-6-202, 76-6-203, or 76-6-204 or a violation of Section 76-10-2402 regarding commercial terrorism:
 - (a) he enters or remains unlawfully on property and:
 - (i) intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section 76-6-107;
 - (ii) intends to commit any crime, other than theft or a felony; or
 - (iii) is reckless as to whether his presence will cause fear for the safety of another;
 - (b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:
 - (i) personal communication to the actor by the owner or someone with apparent authority to act for the owner;
 - (ii) fencing or other enclosure obviously designed to exclude intruders; or

(iii) posting of signs reasonably likely to come to the attention of intruders; or
(c) he enters a condominium unit in violation of Subsection 57-8-7(7).
(3) (a) A violation of Subsection (2)(a) or (b) is a class B misdemeanor unless it was committed in a dwelling, in which event it is a class A misdemeanor.

In the instant matter, insufficient evidence exists to show that Larsen met the elements that are necessary to be convicted of Criminal Mischief and Criminal Trespass. The State failed to meet their burden of proving the elements of UTAH CODE ANN. §§76-6-106 and -206. Larsen also had a possessory interest in the property, negating the element of each crime charged that Larsen's actions were unlawful in this matter. Therefore, the convictions of Larsen for criminal mischief and trespass cannot stand.

ARGUMENT

I. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT THE ELEMENTS FOR A CONVICTION OF CRIMINAL MISCHIEF

No person accused in the United States may be convicted of a crime unless each element of the offense has been proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (emphasis added). The United States Supreme Court has assigned this standard of proof constitutional status, linking it to both the Fifth Amendment right to due process of law and the Sixth Amendment right to a jury trial. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S. at 362, 364. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364, 90 S.Ct. at 1073, 25 L.Ed.2d 368 (1970).

In order to challenge a court's factual findings, ‘an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.’”Chen v. Stewart 2004 UT 82, ¶76, 100 P.3d 1177, (Utah 2004), *citing* Wilson Supply v. Fradan Mfg. Corp. 2002 UT 94 at ¶ 21, 54 P.3d 1177.

UTAH CODE ANN. §76-6-106 sets forth the elements of criminal mischief as follows:

- (2) A person commits criminal mischief if the person:
 - (a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;
 - (b) intentionally and unlawfully tampers with *the property of another* and as a result:
 - (i) recklessly endangers:
 - (A) human life; or
 - (B) human health or safety; or
 - (ii) recklessly causes or threatens a substantial interruption or impairment of any critical infrastructure;
 - (c) intentionally damages, defaces, or destroys *the property of another*; or
 - (d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.
- (3) (a) (i) A violation of Subsection (2)(a) is a third degree felony.
- (ii) A violation of Subsection (2)(b)(i)(A) is a class A misdemeanor.
- (iii) A violation of Subsection (2)(b)(i)(B) is a class B misdemeanor.
- (iv) A violation of Subsection (2)(b)(ii) is a second degree felony.

(Emphasis added). “Possessory interest” is defined as, “the right to exert control over specific land to the exclusion of others, coupled with the intent to exercise that right.” Gilbert Law Summaries, Pocket Size *Law Dictionary*, pp. 249. The Colorado Supreme Court provides helpful insight by stating that, “[t]he definition of property ‘of another,’ . . .states ‘[p]roperty is that of “another” if *anyone* other than the defendant has possessory or

proprietary interest therein.” People v. Clayton, 728 P.2d 723, 726 (Colo. 1986). Similarly, this Court has determined that, “Model Penal Code § 223.0(7) defines ‘property of another’ to include ‘property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property.’” State v. Larsen, 834 P.2d 586, 591, fn. 2 (Utah App. 1992).

As is stated *supra*, in order for a person to be convicted on a charge of criminal mischief the person must intentionally or unlawfully tamper with the property *of another* and the result must recklessly endanger a human life or human health or safety or the person must intentionally damage, deface, or destroy the property *of another*. In this matter, insufficient evidence has been presented to met these elements.

Tamela Hudyma, who was the girlfriend of Larsen at the time of the incident, testified that when Larsen came to the door, she was talking to her daughter on the phone. Tr. at p. 7. Hudyma testified that she told her daughter that Larsen was at the door, so she would have to hang up and call the police department. *Id.* Hudyma testified that she did not remember whether Larsen had banged, knocked, or yelled to alert her that he was at the door, but she knew it was Larsen when she saw him through the peephole. *Id.* Hudyma testified that she called the police and then Larsen pushed in the door and threw down a card. Tr. at p. 8. Hudyma testified that the door had been previously damaged, and that it was further damaged by Larsen when he pushed it in. *Id.* Hudyma testified that she then heard somebody on the stairs, and Larsen came back up and she told him that she had the No-Contact Order and that

she had called the police department. *Id.* Hudyma testified that when the officers showed up, she and Larsen were in her bathroom. Tr. At p. 9. Hudyma testified that she did not recall any yelling and screaming between her and Larsen when the officers arrived. *Id.* Hudyma testified that her door had been cracked prior to the night in question. Tr. at p. 21. Hudyma testified that she thought, because of the door's splitting, that the door is hollow and has a wooden core with a metal shell, and that in the summer the door would swell badly, causing it to stick. *Id.* Hudyma testified that the photos of the door in State's Exhibit No. 1 show both damage that had occurred prior to the night in question, as well as the damage done by Larsen. *Id.* Hudyma testified that the door had been taped because of the crack in the swelling. *Id.* Hudyma testified that she did not know if the police had removed the tape prior to taking the picture. Tr. at p. 21-22. Hudyma testified that there was still tape on the door when she came out of the bathroom after the police arrived. Tr. at p. 22. Hudyma testified that said tape was visible in the photographs in State's Exhibit No. 1, and that she did not know whether any tape had been removed. *Id.*

Hudyma testified that she was not afraid for her physical safety. Tr. At p. 18-19. The State attempted to prove that Larsen damaged the door by kicking in the door in anger, however, the testimony by the Hudyma reflects that she herself knew that the door had been damaged prior to the incident in question. The officers also testified as to the damage of the door, and noticing the tape already on the door. Woodard testified that he and Rogers were the very first two to arrive on the scene. Tr. at p. 38. Woodard testified that when they came

up the stairs, they saw no one; the door, which was damaged, was open, and they announced who they were and went in. Tr. at p. 33-34. Woodard testified that they could hear arguing and that he recognized Larsen's voice, which was agitated. Tr. at p. 34.

Officer Lambert testified that he that he went back upstairs, stood up there, got a statement from Hudyma, and took the pictures of the broken door identified as State's Exhibit No. One (1). *Id.* Lambert testified that the photographs fairly and accurately represent what the door looked like on the night in question. Tr. at p. 44.

Insufficient evidence exists to support the fact the Larsen intentionally damaged the property of Hudyma during the incident at issue herein. First, testimony was offered Hudyma herself that she informed the officers that the door had been damaged previously and that tape had been placed on the door because of that damage. Hudyma had testified that the door was cracked and in the summer time would swell badly and this is why she had placed tape upon the door. Other than Hudyma testifying that she thought Larsen might have further damaged the door when he pushed the door in, no evidence was presented to show that Larsen intentionally pushed the door open with the intent to damage it. Hudyma additionally testified that the door could be opened without a key or much effort, evidencing that force was unnecessary.

At trial Larsen himself stated to the trial court at trial that on the night of the incident, he had gone to Hudyma's residence to give her the card to tell her he was leaving so that she could get her life in order and get her daughter back. Tr. at p. 62. Larsen stated that his only

intention in going over there had been to leave the card. *Id.* Therefore, no evidence has been presented to show that Larsen had the necessary requisite intent to cause damage to the property of Hudyma. In fact, Larsen could not have the intent to damage Hudyma's property because he had a possessory interest in the property and he could not be charged with damaging his own property.

Hudyma testified that Larsen had never lived in her home, but that she had lived with him in his home. Tr. at p. 19. Hudyma testified that the last time that she and Larsen had lived together was in February of 2006. *Id.* Hudyma testified that Larsen still had some of his personal possessions in her home, including his fish tank and a pet Bearded Dragon that was originally supposed to belong to Hudyma's daughter, and for which they had all contributed funds. *Id.* Hudyma testified that Larsen had kept some of his movies as well as some of his clothes in her home at times when she was doing his laundry. Tr. at p. 20. Hudyma testified that Larsen had occasionally spent the night at her home in the past, but, more often, she would go to his house to spend the night. *Id.* Hudyma testified that at one time Larsen had a key to her home, but that on the night in question, he did not have a key, and that because she had problems with the locks, nobody used a key. Tr. at p. 20-21.

It is clearly evident that Larsen's possessions were on the property in the form of everyday-type items such as living necessities and entertainment, and that he had spent the night on several occasions. When coupled with the fact that Larsen had a key to the property,

it is clear that Larsen had a possessory interest in the property as a cohabitant of Hudyma's. Thus it is impossible for Larsen to be charged with damaging his own property.

One cannot criminally damage property that they maintain a possessory interest in. As a result, Larsen cannot be found guilty of criminal mischief because the elements pursuant to Utah law have not been met and the testimony given at trial proves that Larsen had belongings and possessions on the property and that he was given a key to the property. Because Larsen had a possessory interest in the property, did not have the necessary requisite intent to damage the property and the evidence was inconclusive to show that Larsen actually caused further damage to the door, the evidence is insufficient to sustain Larsen's conviction for criminal mischief based upon intentional damage done to the property of another.

The other element required for the crime of criminal mischief to have occurred was that there must be the intent to harm the health or safety of a person. It is not undisputed in this case that there was in fact a no-contact order issued between Larsen and Hudyma. However, the reasons for said No-Contact Order are not those of health and safety. Hudyma testified that on said date, though she had been given a No-Contact Order from Judge Manley prohibiting her from contacting Larsen, Larsen came to the door. *Id.* Hudyma testified that she understood she could not have contact with Larsen so she called the police. *Id.*

Hudyma testified that when Larsen came to the door, she was talking to her daughter on the phone. Tr. at p. 7. Hudyma testified that she told her daughter that Larsen was at the door, so she would have to hang up and call the police department. *Id.* Hudyma testified that

she got a protective order the next day. *Id.* Hudyma testified that though she was not afraid of Larsen, she was fearful of what Larsen might do next in his desperation of wanting to talk to her. *Id.* Hudyma testified that she thought it was best to get a protective order because she continued to get in trouble in the juvenile matter. *Id.* Hudyma testified that she had not necessarily stated in the protective order that she was afraid. Tr. at p. 11. Hudyma testified that she obtained the protective order because she thought it would eliminate any confusion as to who could talk to who and when. *Id.* Hudyma testified that the State's Exhibit No. 2 was her protective order, that she had made the statement therein, and that she had sworn to it. Tr. at pp. 12, 14. After reading the protective order silently to herself, Hudyma testified that reading it had refreshed her memory, and that, as the protective order said, she had been fearful for herself and for Larsen because she didn't want either of them to get into any further trouble for trying to talk to the other. Tr. at pp. 12-13. Hudyma testified that she was afraid of what might happen in the future if this was not resolved. Tr. at p. 13.

By Hudyma's own admission, she was not fearful of Larsen and, in fact, she got the No-Contact Order for the purpose of getting her child back in the other pending action against her. She was afraid of the consequences of having contact with Larsen because it could risk the outcome of the other action against her. It was not obtained by her because she felt her health and safety were at risk. Hudyma was not afraid for her health and safety, but afraid for the consequences that could occur if she continued to talk to Larsen, this is why she obtained a protective order so that she could work towards getting custody of her

daughter back and not get into further trouble by communicating with Larsen. She was not fearful of Larsen hurting her. Therefore, the element of intent to harm the health or safety of Hudyma has not been met. Having not presented sufficient evidence to meet the elements of criminal mischief beyond a reasonable doubt, Larsen's conviction for such should be overturned.

II. INSUFFICIENT EVIDENCE EXISTS TO SUSTAIN THE CONVICTION OF CRIMINAL TRESPASS

UTAH CODE ANN. §76-6-206 defines criminal trespass as follows:

(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76-6-202, 76-6-203, or 76-6-204 or a violation of Section 76-10-2402 regarding commercial terrorism:

(a) *he enters or remains unlawfully on property* and:

(i) intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section 76-6-107;

(ii) intends to commit any crime, other than theft or a felony; or

(iii) is reckless as to whether his presence will cause fear for the safety of another;

(b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:

(i) personal communication to the actor by the owner or someone with apparent authority to act for the owner;

(ii) fencing or other enclosure obviously designed to exclude intruders; or

(iii) posting of signs reasonably likely to come to the attention of intruders; or

(c) he enters a condominium unit in violation of Subsection 57-8-7(7).

(3) (a) A violation of Subsection (2)(a) or (b) is a class B misdemeanor unless it was committed in a dwelling, in which event it is a class A misdemeanor.

(Emphasis added). In a defense based upon possessory interest as it pertains to the charge of criminal trespass, the Utah Supreme Court has upheld the charge when the prosecution has produced substantial evidence supporting the unlawful presence on the property. State v. Hamilton, 2003 UT 22, ¶37, 70 P.3d 111. Such evidence included documentation as to the

possession of the property such as tax deed, quiet title judgments, writ of restitution, defendant's prior trespass convictions, and testimony that defendant did not have permission to be on the land. *Id.* As shown further below, none of this type of evidence was presented in this matter.

In order for Larsen to have been convicted of criminal trespass, the evidence must show that Larsen remained unlawfully on the property. No evidence has been presented that shows that Larsen entered or remained unlawfully on the property. First, Hudyma let Larsen into the residence on the night of the incident. She testified that she did not remember whether Larsen had banged, knocked, or yelled to alert her that he was at the door, but she knew it was Larsen when she saw him through the peephole. Tr. at p. 7. Also no evidence was presented to show that Hudyma ever asked Larsen to leave, allowing him to remain on the property. Second, as argued *supra* Larsen has possessory interest in the property. Hudyma testified that Larsen had never lived in her home, but that she had lived with him in his home. Tr. at p. 19. Hudyma testified that the last time that she and Larsen had lived together was in February of 2006. *Id.* Hudyma testified that Larsen still had some of his personal possessions in her home, including his fish tank and a pet Bearded Dragon that was originally supposed to belong to Hudyma's daughter, and for which they had all contributed funds. *Id.* Hudyma testified that Larsen had kept some of his movies as well as some of his clothes in her home at times when she was doing his laundry. Tr. at p. 20. Hudyma testified that Larsen had occasionally spent the night at her home in the past, but, more often, she

would go to his house to spend the night. *Id.* Hudyma testified that at one time Larsen had a key to her home, but that on the night in question, he did not have a key, and that because she had problems with the locks, nobody used a key. Tr. at p. 20-21.

The State failed to present documentary evidence that the residence belonged to Hudyma and the testimony presented by Hudyma evidences that she allowed him to be on the property at the time of the alleged incident herein. Additionally, Hudyma did not offer any testimony that Larsen was not allowed to be on the property. As argued *supra*, the possessions he maintained on the property evidence that he was a co-habitant with possessory interest in the property itself.

One cannot trespass on property that they maintain a possessory interest in. As a result, Larsen cannot be found guilty of criminal trespass because the State failed to meet the requisite elements pursuant to UTAH CODE ANN. §76-6-206 and the testimony and evidence provided proves that his belongings and possessions were present on the property and that he was given a key to location. Therefore, because insufficient evidence was presented to show that Larsen entered or remained unlawfully on the property that he had a possessory interest in and that he was admitted onto by Hudyma, Larsen's conviction for criminal trespass cannot stand.

CONCLUSION

Wherefore, based upon the foregoing, Larsen respectfully requests that this Court overturn the Judgment and enter other such orders as this Court deems appropriate.

DATED this 9th day of July 2007.

William L. Schultz
Attorney for George Larsen

CERTIFICATE OF MAILING

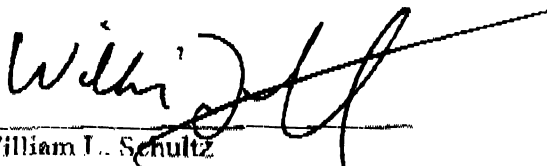
I hereby certify that on this 9th day of July, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

Happy J. Morgan
Grand County Attorney
125 East Center
Moab, Utah 84532

CONCLUSION

Wherefore, based upon the foregoing, Larsen respectfully requests that this Court overturn the judgment and enter other such orders as this Court deems appropriate.

DATED this 9th day of July 2007.

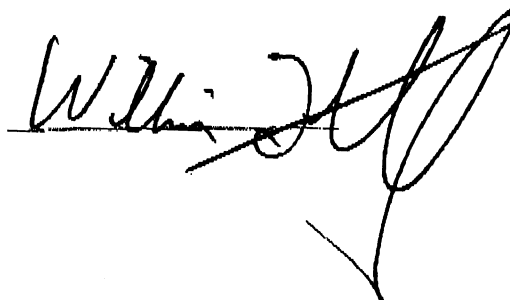


William L. Schultz
Attorney for George Larsen

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of July, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

Happy J. Morgan
Grand County Attorney
125 East Center
Moab, Utah 84532



Addendum ~A~
Judgment,
dated February 2, 2007

SEVENTH DISTRICT COURT
OF GRAND COUNTY

FILED FEB 12 2007
CLERK OF THE COURT

BY *[Signature]*

DEPUTY

IN THE SEVENTH DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff,)	Case No. 0617-167
)	
vs.)	
)	JUDGMENT
GEORGE LARSEN,)	
)	
Defendant,)	

JANURAY 23, 2007

Honorable Lyle R. Anderson Presiding

Happy J. Morgan, for Plaintiff

William L. Schultz, for Defendant

DEFENDANT, GEORGE LARSEN, having a bench trial and the Court hearing evidence, the Court hereby finds the following on

Count 1: RESTRICTED PERSON IN POSSESSION OF A DANGEROUS WEAPON, a CLASS A MISDEMEANOR, Not Guilty;

Count 2: CRIMINAL MISCHIEF, a CLASS B MISDEMEANOR; Guilty,

Count 3: CRIMINAL TRESPASS, a CLASS B MISDEMEANOR; Guilty,

Count 4: DISORDERLY CONDUCT, a CLASS C MISDEMEANOR; Guilty,

and no legal reason having been shown why judgment of this Court should not be pronounced, it is the judgment of this court as follows:

That the defendant serve a CONCURRENT terms in the GRAND COUNTY JAIL of SIX (6) MONTHS on counts 2 and 3, and NINETY (90) DAYS CONSECUTIVE in the GRAND COUNTY JAIL on count 4. The Defendant does not receive credit for time served, but may quality for good time.

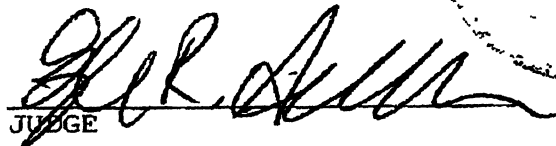
Defendant is hereby remanded to the custody of the Grand County Sheriff or other proper officer to begin serving his sentence.


Failure to comply with the terms of this judgment will result in the immediate issuance of a bench warrant.

The Court retains jurisdiction to make such other and further orders as it may deem necessary from time to time.

DATED this 31st day of January, 2007.

BY THE COURT:


JUDGE


H. J. Morgan
Grand County Attorney

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on the 2nd day of February, ~~January~~

2007, I caused to be delivered via hand delivery _____, postage prepaid mail _____, in courthouse file ✓, fax _____, a true and correct copy of the above to:

William L. Schultz
Attorney for Defendant

I placed a true and correct copy in the courthouse file of:

Grand County Attorney

I hand delivered a true and correct copy to:

Grand County Jail

Chelsy J. Allen

